Supreme Court, U.S.
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NO. 02-448

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMY DOUGLAS HILL,
LUCAS GALLAGHER, AND GEORGE LARRY COURS,
AS NEXT FRIEND OF COURTNEY COURS, A MINOR,
Petitioners,

v.

CITY OF FREEPORT, TEXAS AND BRAZOSPORT INDEPENDENT SCHOOL DISTRICT,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 7, 2002

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In their responses to Petitioners' Petition for Writ of Certiorari, Respondents assert that the Fifth Circuit correctly applied this Court's holding in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), and that Petitioners' argument based on *Picha v. Wielgos*, 410 F.Supp. 1214 (N.D. Ill. 1976), is without merit. Respondent Brazosport Independent School District's Brief in Opposition at 4 - 6; Respondent City of Freeport, Texas' Brief in Opposition at 6 - 9. Respondents are in error in both of these arguments.

In upholding the District Court's finding that this case fell within the "special needs exception" to the Fourth Amendment, the Fifth Circuit relied on this Court's holding in *Vernonia* as authority for allowing local police officials and school district officers to summarily seize students out of the classroom, handcuff them, frisk them, transport them to the police station and hold them against their will and under the threat of imprisonment for the sole reason that the students were "socially connected" to a student who had previously left what the school district and police authorities claimed was a threatening note one week before. Petition Appendix ("App.") at B4 - B5. The trial court, without any kind of evidentiary hearing or even summary judgment evidence being put forth, dismissed the case under FED. R. CIV. PROC. 12(b)(6). App. at D11.

What *Vernonia* and *Board of Education of Pottawatomie County v. Earls*, 122 S.Ct. 2559 (2002) both make clear is that when this Court has authorized school officials to drug test students, it has been important to the decision that the results of the testing

would not be used in a criminal context, local police authorities were not notified of the test results and a great deal of effort was made to protect the privacy of the students and their bodily integrity. In this case, there was significant law enforcement direction and control involved. Students were seized out of the classroom, frisked, handcuffed, threatened with imprisonment, and held them against their will by law enforcement officers, not school officials. Further, there was nothing in Petitioners' petition or pleadings filed in response to the Respondents' moving papers that would have suggested that Respondents did anything to attempt to protect the privacy interests of the Petitioners. App. at E1 -13. To the contrary, Respondents made a public display of Petitioners' arrests to intimidate Petitioners and the entire student body.

The Respondents have either disregarded Petitioners' arguments based on *Picha* and its progeny (*see generally* Brief of Respondent City of Freeport), or have misconstrued the law and the importance of the *Picha* case (*see generally* Brief of Respondent Brazosport at 4 - 6). The District Court specifically failed to address the issues raised by *Picha*, instead dismissing the issue without explanation. App. at D7. Respondent City of Freeport specifically pleaded in its brief to the Fifth Circuit that not only were the Petitioners *not suspected of engaging in any criminal conduct,* Freeport claimed that Petitioners were *not even seized and taken into custody in connection with the investigation of any criminal conduct.* Brief of Appellee City of Freeport at 11. Freeport made this argument to avoid the pitfalls of the holding in *Picha* and the cases that have followed it in which the courts have required that before there may be a constitutional warrantless search of a student there must be at least a reasonable, individualized suspicion that the student has engaged in wrongdoing.

Contrary to the claims of Brazosport in its response, *Picha* has been cited widely for the proposition that, if school officials bring in local police to conduct a search and possible seizure of students, the police must act based on a reasonable suspicion that the student subject to the police action has broken the law. *See* cited cases, Pet. at 15. While it is a district court opinion, the widespread impact of *Picha* cannot be ignored. The fact that this Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) addressed *Picha* in what for all purposes can only be described as a caution to school districts and police authorities, *id.* at 341, n.7, conferred a level of importance to the *Picha* opinion that would not ordinarily be given to a district court opinion. Neither of the Respondents, nor the District Court or the Fifth Circuit, cited even one case that authorized local police authorities to enter the school grounds and search, seize and detain students without any individualized suspicion that they had committed a criminal act or were in the process of committing a criminal act or probable cause as required under the Fourth Amendment. The published opinion in this case now provides authority for such police actions, even when the action is based on "bumbling hysteria" rather than legitimate policing practices.

Vernonia and *Earls* also make it clear that the balancing of governmental and private interests in a search and seizure that implicates Fourth Amendment interests is fact-intensive, and that before a special needs exception may allow for certain police conduct that would otherwise violate the Fourth Amendment, an evidentiary hearing should be held to determine whether in fact the special needs of the government are so compelling that they outweigh the inherent risks associated with disbanding the constitutional requirement of probable cause. In this case, there was no evidentiary hearing to allow either party to establish whether

or not there was truly a special need that would vitiate the Fourth Amendment requirements of probable cause, or at least some individualized suspicion that the Petitioners had engaged in a breach of the law or were in the process of breaching the law.

The District Court's published opinion and the affirmation of that decision by the Fifth Circuit has created a significant conflict not only between other cases in the Fifth Circuit but in other circuits and, arguably, even with the implication of this Court's dicta in *New Jersey v. T.L.O.* In light of the District Court's refusal to even acknowledge or address the issue raised by Petitioners concerning the constraints placed on local law enforcement officials by the Fourth Amendment when they are conducting searches of students and previous court rulings on the issue, Petitioners' case is appropriate for review by a grant of certiorari, vacation and remand in light of *Pottawatomie County v. Earls.*

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted, and the case vacated and remanded for reconsideration in light of *Board of Educ. Of Pottawatomie County v. Earls, supra,* or in the alternative, set for hearing on the merits before this Honorable Court.

Respectfully submitted,

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